

trespass: but that a conviction upon an indictment, which was the suit of the king, was no bar to an action. Then there is the case of *Higgins v. Butcher* (Velv. 89). This was an action brought by the plaintiff for assaulting his wife, whereby she died. It was objected that this was a personal action, which died with the wife. Tanfield, J. says: "If a man beats the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost." After that comes the case of *Dawkes v. Coveleigh* (Styles, 346). This was an action of trespass and carrying away £250. The plea was not guilty. A special verdict was found to the effect that the defendant did feloniously break the house and carry away the £250 and was indicted for it, and was found guilty and burnt in the hand for it. The question was whether, under these circumstances, an action for trespass was maintainable by the party injured. There was at first a difference of opinion amongst the judges, but upon re-argument the whole court agreed with Roll, C.J., who said: "This is after a conviction, and so there is no fear that the felon shall not be tried; but if it were before conviction, the action would not lie, for the danger the felon might not be tried. And there is no inconvenience if the action do lie, and since he could not have had his remedy before, he shall not now lose it; and now there is no danger of compounding for the wrong." Judgment was accordingly given for the plaintiff. It may be added that the decision in the case of *Higgins v. Butcher* was on the ground that *actio personalis moritur cum persona*. From the time of the case of *Dawkes v. Coveleigh* there was no attempt made to interfere with actions on this ground until the case of *Gimmon v. Woodfull*. The dicta had been repeated in the books, and the law had been so laid down in that case. Best, C.J., acted upon it, and made it a ground for nonsuiting the plaintiff. That case, however, was overruled by *White v. Spettigue* (13 M. & W. 693.) Then we come to the case of *Welluck v. Constantine* (2 H. & C. 146.) In that case there was no issue of felony to be tried by the jury. The plaintiff, on the face of the declaration, alleged that a felony had been committed. That, probably, would have been a case for the summary jurisdiction of the court in staying the action. No such course, however, was taken. The case went down to trial, and my brother Willes nonsuited the plaintiff. The court did not set aside that nonsuit. Throughout the argument, the dicta of the judges seemed to be that the judge was wrong in nonsuiting, and that what he should have done was to stay the proceedings. The court then suggested a *set processus*; but the parties not being able to agree, the court thought it right to discharge the rule. They might have set aside the nonsuit, on the terms that all proceedings in the action should be stayed until the question of felony had been settled. I do not understand the decision. I think that it would

be a mistake in applying the rule to call upon the jury to try a question of felony which was not before them.

LUSH, J.—I am of the same opinion. The party injured should, in the first instance, prosecute, and until he does so, cannot obtain redress. That is the rule; but how it is to be enforced we are nowhere informed. No instance has been mentioned to us in which the civil proceeding has been stayed. The defendant cannot set up his own criminality. The judge at Nisi Prius cannot interfere in the middle of the trial of the cause. He cannot refuse to try the cause. He cannot stay it. He cannot nonsuit the plaintiff, if there be evidence to go to the jury in support of his case upon the issues joined. He cannot direct a verdict contrary to the evidence. If the declaration on the face disclose a felony, that would be a ground for demurrer, or for a motion in arrest of judgment.

QUAIN, J.—I am of the same opinion. This is an application for a new trial on the ground of misdirection; that the judge should have directed a nonsuit or a verdict for the defendant on the ground that he had been guilty of a felony. The defendant did not say a word at the trial about a felony. He took his chance of a verdict. Now he says that a felony was committed. This is a position inconsistent with that which he took at the trial. He has no right to come here under these circumstances. Is there any case where such a course has been adopted, or where such a plea has been pleaded? There is none here such an application has been made by the felon himself. We cannot make such a precedent. If it appeared upon the face of the declaration, then it might be a case for demurrer, or for a motion in arrest of judgment.

Rule discharged with costs.

REVIEWS.

A TREATISE ON THE LAW OF DAMAGES: Comprising the measure, the mode in which they are assessed and reviewed, the practice of granting New Trials, and the Law of Set-off. By John D. Mayne, of the Inner Temple, Esquire, Barrister-at-Law. The Second Edition, by Lumley Smith, of the Inner Temple, Esquire, Barrister-at-Law, Fellow of Trinity Hall, Cambridge. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar. 1872.

When the first edition of this work appeared in 1850, it was welcomed as an able and a much needed exposition of the Law of Damages. The only preceding work of the kind in England was the old and forgotten treatise of Sergeant Sayer. In the United States, Professor Sedgwick had written a work on the Law of Damages that, so far as his coun-